

Honorable Suzanne H. Segal (Ret.)  
Signature Resolution  
633 W. 5<sup>th</sup> Street, Suite 1000  
Los Angeles, CA 90071  
JudgeSegal@SignatureResolution.com

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

COSTAR GROUP, INC. AND  
COSTAR REALTY INFORMATION,  
INC.,

*Petitioners,*

v.

MOBIUS365 KNOWLEDGE  
SERVICES, INC.,

*Respondent,*

v.

COMMERCIAL REAL ESTATE  
EXCHANGE, INC.,

*Intervenor Respondent.*

Case No. 2:24-00038 CBM (ASx)

SPECIAL MASTER'S ORDER  
GRANTING IN PART AND  
DENYING IN PART COSTAR'S  
MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS  
FROM MOBIUS

(Dkt. No. 1 and related filings)

[1][2]

1 On February 16, 2024, Petitioner CoStar Group, Inc. and CoStar Realty  
2 Information, Inc. ("CoStar") filed a Motion to Compel Production of Documents  
3 from Respondent Mobius365 Knowledge Services, Inc. ("Mobius") in the United  
4 States District Court for the Eastern District of North Carolina (the "Motion")  
5 (Dkt. 1), which was subsequently transferred to this Court (Dkt. 18). Respondent  
6 Mobius filed an opposition on March 19, 2024 (Dkt. 27). Intervenor Respondent  
7 Commercial Real Estate Exchange, Inc. ("CREXi") also filed an Opposition on  
8 March 19, 2024 (Dkt. 31). On March 20, 2024, CoStar filed a Reply to Mobius's  
9 Opposition (Dkt. 35) and a Reply to CREXi's Opposition (Dkt. 37-1.) The  
10 matter was referred to the Special Master on May 16, 2024.  
11

12  
13 The Special Master has considered the Motion, the Oppositions, the  
14 Replies, and all related filings. The parties waived a hearing on this motion. For  
15 the reasons discussed below, the Motion is GRANTED in PART and DENIED in  
16 PART.  
17

## 18 A. COSTAR'S CONTENTIONS

19  
20 Respondent Mobius365 Knowledge Services, Inc. ("Mobius")  
21 repeatedly thumbed its nose at the Rule 45 subpoena issued by  
22 Petitioners CoStar Group, Inc. and CoStar Realty Information, Inc.  
23 ("CoStar"), ignoring agreed production deadlines, withholding  
24

1 responsive documents, and then producing some selected, responsive  
2 documents in a format that significantly hampered CoStar's ability to  
3 review them. In an effort to avoid judicial intervention, CoStar met  
4 and conferred with Mobius for five months about Mobius's response  
5 to the subpoena, and ultimately persuaded Mobius to address some-  
6 but not all concerns. (Dkt. 1 at 1.)

7  
8 ***First***, Mobius refuses to cure the deficient nature of its privilege  
9 log (the "Privilege Log"), which Mobius produced four months *after*  
10 the production deadline and which is facially non-compliant with Rule  
11 26. For example, 12 of the 151 communications on the Privilege Log  
12 are with a third party-Commercial Real Estate Exchange, Inc.  
13 ("CREXi"), the defendant in the underlying copyright litigation  
14 pending in the Central District of California-thus are presumptively  
15 not privileged as the attorney-client privilege is waived upon  
16 disclosure of an otherwise privileged communication to a third party.  
17 The log also does not identify a single attorney (indeed, it does not  
18 identify most participants by their full name and identifies some  
19 participants as "Mobius"); it does not describe the nature of any  
20 withheld communication (again, oftentimes "describing" documents  
21 only as "Mobius"); and while all 151 entries are withheld as  
22 "attorneyclient privilege and attorney work product," the log does not  
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24

1 contend that a single withheld communication purports to be between  
2 an attorney and client for the purpose of obtaining legal advice, or  
3 prepared in anticipation of litigation. (Dkt. 1 at 1.)  
4

5 *Second*, Mobius has refused to produce documents in compliance  
6 with production norms such that they can be reviewed in an efficient  
7 manner, instead producing documents without metadata, not as  
8 families, and, in some instances, where documents are not readable.  
9 (Dkt. 1 at 1.)  
10

11 *Third*, even a cursory review of Mobius's production reveals  
12 significant production gaps, the most glaring of which is Mobius's  
13 failure to produce a single CoStar image in its possession  
14 notwithstanding the fact that it uploaded thousands of CoStar-owned  
15 images to CREXi's platform. (Dkt. 1 at 1.)  
16  
17

18 CoStar respectfully requests an order (1) finding that Mobius  
19 waived privilege over the 151 documents on the Privilege Log and  
20 compelling their production, (2) compelling Mobius to reproduce the  
21 documents it has produced in compliance with the protocol set forth in  
22 the subpoena; and (3) compelling Mobius to supplement its  
23  
24

1 production with documents in its possession, custody, and control that  
2 are responsive to the Subpoena but not yet produced. (Dkt. 1 at 1-2.)  
3

#### 4 **B. MOBIUS’S CONTENTIONS**

5

6 Mobius is an innocent third-party to this dispute. Mobius has  
7 complied with all of its obligations with respect to the subpoena  
8 issued by CoStar, including multiple productions of over 26,000 pages  
9 of documents, and serving three privilege logs, containing over 200  
10 detailed entries. Yet, CoStar’s counsel continues to demand more and  
11 more information and documents with each coming week, even  
12 though such information was not initially requested. Despite Mobius  
13 caving to almost every single one of CoStar’s demands, CoStar filed a  
14 Motion to Compel against Mobius while ignoring five separate  
15 written requests for a telephone conference on these issues over the  
16 course of six weeks, forcing Mobius to incur thousands of dollars in  
17 attorney’s fees to oppose this unnecessary Motion. (Dkt. 27 at 1.)  
18  
19

20 CoStar’s recent “waiver” argument is nonsensical for a couple of  
21 reasons: (1) Mobius complied with all requests for a privilege log and  
22 all requests for multiple amendments of said privilege log; (2) the  
23 only period of alleged “delay” in producing the privilege log pertained  
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1 to Mobius' initial production, which contained a mere 3 privileged  
2 emails (as relayed to CoStar's counsel). *See* Ex. C at p. 6. The other  
3 148 entries on Mobius' Privilege Log were from Mobius' January  
4 23rd production, and its privilege log for such documents was  
5 delivered *six days* later (on January 29). *Id.* That CoStar would waste  
6 this Court's time in seeking to compel the production of over one  
7 hundred admittedly privileged documents over a *six-day* delay is  
8 absurd and unethical. (Dkt. 27 at 9-10.)  
9

### 10 C. CREXI'S CONTENTIONS

11

12 CREXi opposes CoStar's motion as to the subset of documents  
13 withheld as CREXi's work product. These documents fall into two  
14 categories, both of which are in the heartland of work product  
15 protection: (1) direction from CREXi's counsel to Mobius to engage  
16 in discrete projects to assist in CREXi's investigation of claims in the  
17 lawsuit *CoStar v. CREXi*, 20-cv-08819-CBM-AS (2020) ("Underlying  
18 Litigation"); and (2) documents Mobius created in connection with  
19 those projects. (Dkt. 31 at 1.)  
20  
21  
22  
23  
24

1 For multiple reasons, CREXi expected Mobius would keep  
2 documents concerning the work conducted at the direction of  
3 CREXi's counsel confidential. First, Mobius and CREXi have long  
4 had a Nondisclosure Agreement that prevents Mobius from disclosing  
5 such information. Second, CREXi orally directed Mobius to keep  
6 litigation-project-related documents confidential. Third, Mobius and  
7 CREXi contemporaneously labelled such documents "Privileged." As  
8 the court in the Underlying Litigation recently held, where documents  
9 are prepared by a third-party vendor "at the direction of [a party's]  
10 counsel because of . . . litigation and would not have been created in  
11 substantially similar form but for the litigation," the documents  
12 constitute protected work product. *CoStar v. CREXi*, 20-cv-08819-  
13 CBM-AS, ECF 702-1 (February 21, 2024) ("Ord. ECF 702-1"). The  
14 same applies here. This Court should deny CoStar's motion as to the  
15 documents on CREXi's privilege log. (Dkt. 31 at 1.)  
16

17  
18 **D. COSTAR'S CONTENTIONS ON REPLY TO MOBIUS'S**  
19 **OPPOSITION**  
20

21 Mobius produced three untimely privilege logs in response to  
22 CoStar's subpoena, none compliant with Rule 26. At a minimum,  
23 privilege logs must contain "(a) the attorney and client involved, (b)  
24

1 the nature of the document, (c) all persons or entities shown on the  
2 document to have received or sent the document, (d) all persons or  
3 entities known to have been furnished the document or informed of its  
4 substance, and (e) the date the document was generated, prepared, or  
5 dated.” *Khasin v. Hershey Co.*, 2014 WL 690278, at \*2 (N.D. Cal.  
6 Feb. 21, 2014).

7  
8 Mobius’s first log included third-party communications and did  
9 not sufficiently identify participants or describe the documents. ECF 2  
10 at 6-7. Rather than contest those fatal flaws, Mobius produced an  
11 amended log after CoStar filed the instant motion, still failing to  
12 identify a single attorney. Six days later, Mobius produced a second  
13 amended log (the “Third Log”), which still lacks sufficient  
14 information to allow CoStar to evaluate Mobius’s privilege assertions.  
15 (Dkt. 35 at 1.)  
16

17  
18 After three facially deficient logs, Mobius’s opposition tries to  
19 excuse those gaping holes after the fact by now pointing to a  
20 declaration from a Mobius employee, which Mobius claims  
21 “establishes every element of the attorney-client privilege.” Mob.  
22 Opp. at 11. It does not; it lumps together hundreds of documents and  
23 claims “Mobius was communicating” with unspecified “attorney(s)”  
24



1 about “confidential legal advice” regarding “potential litigation or  
2 ongoing litigation.” Mob. Ex. I, ¶ 6. Regardless, a “vague declaration  
3 that states only that the document ‘reflects’ an attorney’s advice is  
4 insufficient to demonstrate ... privilege[.]” *Dolby Laby’s Licensing*  
5 *Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 866 (N.D. Cal. 2019)  
6 (citation omitted). (Dkt. 35 at 2.)

7  
8 Mobius’s unapologetic non-compliance with Rule 26 supports a  
9 waiver. (Dkt. 35 at 2.)

10  
11 In the alternative, CoStar respectfully requests *in camera* review  
12 of documents on the Third Log. *Roblox Corp. v. WowWee Grp. Ltd.*,  
13 2024 WL 815516, at \*3 (N.D. Cal. Feb. 27, 2024) (conducting in  
14 camera review because the “Court cannot determine ... privilege[]  
15 without reviewing the underlying documents”). (Dkt. 35 at 3.)

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18 **E. COSTAR’S CONTENTIONS ON REPLY TO CREXI’S**  
19 **OPPOSITION**

20  
21 *CREXi fails to meet its burden to show that the documents on its*  
22 *privilege log were created “because of” this litigation. In re Grand*  
23 *Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004). CREXi’s work  
24

1 product assertions hinge on the claim that as of March 26, 2021,  
2 “CREXi’s counsel directed Mobius to conduct a handful of discrete  
3 projects to investigate” CoStar’s allegations. Opp. at 2. That *post hoc*  
4 argument is belied by discovery CREXi has produced in this case and  
5 testimony CREXi has offered. (Dkt. 37-1 at 1.)  
6

7 Given CREXi’s testimony and verified discovery responses—  
8 which conflict with its new claim that Mobius worked on litigation  
9 projects “separate and apart” from its “regular work,” Beck Decl. ¶  
10 5—CREXi falls far short of “demonstrating that the [work product]  
11 protection applies.” *Phoenix Techs. Ltd. v. VMware, Inc.*, 195 F.  
12 Supp. 3d 1096, 1102 (N.D. Cal. 2016). (Dkt. 37-1 at 2.)  
13

14 ***Even if CREXi substantiated its claims (it did not), CREXi (and***  
15 ***Mobius) waived them.*** CREXi waived work product by selectively  
16 producing some of Mobius’s “litigation-related work,” but not all of  
17 it. (Dkt. 37-1 at 2.)  
18

19  
20 CREXi independently waived work product because its conduct  
21 has been “inconsistent with the maintenance of secrecy against  
22 adversaries” (*i.e.* CoStar). *U.S. v. Sanmina Corp.*, 968 F.3d 1107,  
23 1122 (9th Cir. 2020). (Dkt. 37-1 at 2.)  
24

1                    ***Regardless, CoStar has a substantial need for these documents.***  
2                    *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1197 & n.277 (C.D.  
3                    Cal. 2022). (Dkt. 37-1 at 3.)

4  
5                    **F. DISCUSSION**

6  
7                    **1. Mobius Must Re-Produce Documents In the Form Requested By the**  
8                    **Subpoena and Supplement its Production.**

9  
10                    A party demanding production of electronically-stored information (“ESI”)  
11                    may specify the form or forms in which ESI is to be produced. Fed. R. Civ. P.  
12                    45(a)(1)(C); *see also* Fed. R. Civ. P. 34(b)(1)(C). If the requesting party does not  
13                    specify the form or forms for producing ESI, ESI must be produced “in a form or  
14                    forms in which it is ordinarily maintained or in a reasonably usable form or  
15                    forms[.]” Fed. R. Civ. P. 45(e)(1)(B); *see also* Fed. R. Civ. P. 34(b)(2)(E)(ii).  
16

17  
18                    A person or entity responding to a subpoena or request for documents may  
19                    object to producing information in the designated form or forms. Fed. R. Civ. P.  
20                    45(d)(2)(B); Fed. R. Civ. P. 34(b)(2)(D). Absent timely objection, however, the  
21                    producing party must produce ESI in the requested form, unless the parties agree  
22                    or the court orders otherwise. *Morgan Hill Concerned Parents Ass’n v. California*  
23                    *Dep’t of Educ.*, 2017 WL 445722, at \*3 (E.D. Cal. Feb. 2, 2017) (citing cases);  
24

1 *Aguilar v. ICE Division of United States Dept. of Homeland Security*, 255 F.R.D.  
2 350, 356-57 (S.D.N.Y. 2008) (responding party “must either produce ESI in the  
3 form specified or object”).  
4

5 CoStar’s subpoena requests Mobius “[p]roduce all Documents as they are  
6 kept in the normal course of business” and “[i]dentify the file from which each  
7 Document was taken, as well as the name, affiliation, and position for each  
8 custodian for each file.” (Dkt. 2-3 at 8, ¶ 3.) The subpoena also instructs, “[i]f  
9 Documents are kept in hard copy, scan to PDF and provide electronically,  
10 identifying the custodian for each file.” (*Id.*) Mobius did not object to the form of  
11 production specified in CoStar’s subpoena. (*See* Dkt. 27-1).  
12

13  
14 CoStar’s subpoena requires Mobius to produce ESI in the form in which it is  
15 maintained in the normal course of business, which includes producing any  
16 metadata maintained in the ordinary course of business. *See Am. Auto. Ins. Co. v.*  
17 *Hawaii Nut & Bolt, Inc. Moore*, 2017 WL 80248, at \*8 (D. Haw. Jan. 9, 2017)  
18 (holding “ESI must be produced in the form in which it is maintained in the  
19 ordinary course of business, and if this includes metadata, the metadata must also  
20 be provided[.]”); *see also Verisign, Inc. Sec. Litig.*, 2004 WL 2445243, at \*2 (N.D.  
21 Cal. Mar. 10, 2004) (holding magistrate judge’s order that party produce electronic  
22 documents in native format was consistent with Federal Rules’ requirement to  
23 produce documents as kept in the usual course of business); *Morgan Hill*  
24

1 *Concerned Parents Ass'n*, 2017 WL 445722, at \*12 (ordering party to reproduce  
2 ESI in native format with all metadata attached); *Williams v. Sprint/United*  
3 *Management Co.*, 230 F.R.D. 640, 652, n.69 (D. Kan. 2005) (holding that  
4 generally, when a party requests or is ordered to produce electronic documents as  
5 they are maintained in the ordinary course of business, “the producing party should  
6 produce the electronic documents with their metadata intact[.]”).

7  
8  
9 Mobius’s production of electronic documents without metadata, PDF  
10 printouts of emails separate from their attachments, and document images that are  
11 partially cut-off or illegible fails to comply with the form of production requested  
12 by the subpoena. CoStar’s Motion is GRANTED to the extent it seeks an order  
13 requiring production of documents with metadata and production of images.  
14 Mobius is ORDERED to re-produce the documents it has already produced in the  
15 form in which such documents are kept in the normal course of business and to  
16 produce accompanying metadata. In addition, Mobius must supplement its  
17 production by producing CoStar images in its possession that have not been  
18 produced but are responsive to CoStar’s subpoena. The Special Master ORDERS  
19 that this supplemental production be completed within 14 days of the date of this  
20 Order.  
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1                   **2. Mobius Has Not Waived Privilege But Must Amend its**  
2                   **Privilege Log.**  
3

4           CoStar asserts that Mobius has waived privilege by its inadequate  
5 production and defective privilege log. A party withholding otherwise  
6 discoverable information based on a claim of privilege or work product protection  
7 must “describe the nature of the documents, communications, or tangible things  
8 not produced or disclosed--and do so in a manner that, without revealing  
9 information itself privileged or protected, will enable other parties to assess the  
10 claim.” Fed. R. Civ. P. 26(b)(5)(A). A privilege log satisfies this burden if it  
11 identifies “(a) the attorney and client involved, (b) the nature of the document, (c)  
12 all persons or entities shown on the document to have received or sent the  
13 document, (d) all persons or entities known to have been furnished the document  
14 or informed of its substance, and (e) the date the document was generated,  
15 prepared, or dated.” *Khasin v. Hershey Co.*, 2014 WL 690278, at \*2 (N.D. Cal.  
16 Feb. 21, 2014).  
17  
18

19           The Ninth Circuit set out four factors to consider when evaluating a claim of  
20 waiver:  
21

22                   [1] the degree to which the objection or assertion of privilege  
23 enabled the litigant seeking discovery and the court to evaluate  
24

1 whether each of the withheld documents is privileged ... [2] the  
2 timeliness of the objection and accompanying information about the  
3 withheld documents ... [3] the magnitude of the document production;  
4 and [4] other particular circumstances of the litigation that make  
5 responding to discovery unusually easy ... or unusually hard.  
6

7 *E.E.O.C. v. Parker Drilling Co.*, 2014 WL 5410661, at \*5 (D. Alaska Oct.  
8 22, 2014) (internal citations omitted). Here, several of the factors weigh against  
9 finding waiver. While CoStar challenges the log, the log was not entirely  
10 defective and was amended by Mobius. Though the Special Master is finding that  
11 additional amendment is necessary, the submitted logs were not so defective as to  
12 compel a finding of waiver. In addition, the magnitude of the document  
13 production is significant enough to counsel against a finding of waiver. Finally,  
14 the circumstances of the litigation – that is, Mobius as a third party to very  
15 complex and expansive litigation – also weigh against finding waiver. It is  
16 understandable that a third party who signed an NDA with a party to the litigation  
17 would be cautious about its production of potentially privileged documents.  
18  
19

20 Mobius's privilege log does not provide sufficient information to permit  
21 CoStar or the Court to adequately assess the privilege claim asserted with respect  
22 to each document. However, a defective or untimely privilege log does not  
23 automatically require a finding that Mobius waived privilege. *Burlington N. &*  
24



1 *Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir.  
2 2005) (rejecting *per se* rule that failure to produce a privilege log in a timely  
3 manner triggers waiver of privileges).

4  
5 ““When a party provides an inadequate or untimely privilege log, the Court  
6 may choose between four remedies: (1) give the party another chance to submit a  
7 more detailed log; (2) deem the inadequate log a waiver of the privilege; (3)  
8 inspect in camera all of the withheld documents; and (4) inspect in camera a  
9 sample of the withheld documents.”” *Sacramento Downtown Arena LLC v.*  
10 *Factory Mut. Ins. Co.*, 2023 WL 5516288, at \*2 (E.D. Cal. Aug. 25, 2023)  
11 (quoting *Johnson v. Ford Motor Co.*, 309 F.R.D. 226, 234–35 (S.D.W. Va. 2015)).  
12

13  
14 Of the four remedies, deeming the inadequate log to result in waiver is the  
15 “most draconian[.]” *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 307 (D.D.C.  
16 2009); *see also Khasin.*, 2014 WL 690278, at \*2 (recognizing “the ‘loss of the  
17 attorney-client privilege’ in adversarial litigation is a ‘severe’ sanction”). “Given  
18 the sanctity of the attorney-client privilege and the seriousness of privilege waiver,  
19 courts generally find waiver only in cases involving unjustified delay, inexcusable  
20 conduct and bad faith.” *Johnson*, 309 F.R.D. at 235.  
21

22 The remedy of finding waiver is not justified here. Mobius has produced  
23 over almost 7,000 documents and has produced a privilege log. While defects  
24



1 exist in the production and the log, these are insufficient to justify the severe  
2 sanction of an across-the-board waiver of attorney-client privilege and attorney  
3 work product protection.

4  
5 *In camera* review, the alternative remedy requested by CoStar, ““is not  
6 generally favored[.]”” *Est. of Thomas v. Cnty. of Sacramento*, 2022 WL 159035, at  
7 \*3 (E.D. Cal. Jan. 18, 2022) (quoting *Nishika, Ltd. v. Fuji Photo Film Co., Ltd.*,  
8 181 F.R.D. 465, 467 (D. Nev. 1998)). *In camera* review may impose unnecessary  
9 delay into the resolution of this dispute. The Special Master does not find *in*  
10 *camera* review appropriate at this stage.

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1 CoStar's Motion is DENIED to the extent it seeks an order finding waiver of  
2 privileges or *in camera* review of withheld documents. CoStar's Motion is  
3 GRANTED to the extent it seeks an amended privilege log from Mobius. Within  
4 14 days of the date of this Order, Mobius must provide an amended and more  
5 detailed privilege log that establishes each element of the claimed privilege with  
6 respect to each document withheld. Fed. R. Civ. P. 26(b)(5)(A). As noted above,  
7 Mobius must also reproduce all previously produced documents with metadata  
8 intact. Mobius must produce images responsive to CoStar's subpoena. If CoStar  
9 remains unsatisfied with Mobius's amended privilege log, it may raise this issue  
10 again with the Special Master. The Special Master directs the parties to request an  
11 informal discovery conference to resolve any disputes arising out of this Order or  
12 the deadlines contained in this Order.  
13

14  
15 IT IS SO ORDERED.

16 DATED: 6/4/2024

17  
18 DocuSigned by:  
Hon. Suzanne Segal (Ret.)  
2B739185DE71459...

19 Honorable Suzanne H. Segal (Ret.)  
20 Special Master  
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